No. 46622-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RUSSELL P. HICKS,

Cross-Appellant/Respondent,

v.

CITY OF FIFE, a Washington municipal corporation,

Appellant/Respondent.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant the City of Fife (the "City") submits the following brief in reply to the issues raised by Respondent Russell P. Hicks ("Hicks") in his response brief.

II. AUTHORITY AND ARGUMENT

A. The City Has Not Waived Its Right to Challenge All Aspects of Hick' Retaliation Claim Involving the Civil Service Commission.

In its anti-SLAPP motion, the City requested the trial court strike a retaliation claim alleged by Hicks in paragraph 4.3 of his Complaint. CP 2-3. The claim involves expiration of a lieutenant promotion list wherein Hicks occupied the top ranking. Based on the language of Hicks' Complaint and written discovery served on the City, it appeared Hicks was attempting to establish liability against the City for statements made by Chief Blackburn to the Civil Service Commission during an open public meeting, a subsequent vote taken by the Commission with respect to expiration of the list, or both theories. Under either avenue, Hicks' retaliation claim violates RCW 4.24.525 because it is based on an action involving public participation and petition. Under either avenue, Hicks cannot show, by clear and convincing evidence, a probability of prevailing on the challenged claim. If Hicks bases his retaliation claim on the vote taken by the Commission, the claim fails because Hicks identified the incorrect defendant. If Hicks bases his retaliation claim on statements made by Chief Blackburn during an open public meeting of the

Commission, the claim fails because the City had legitimate and nondiscriminatory reasons supporting expiration of the list and adoption of a new and improved list.

In his response brief, Hicks argues he has not targeted the actions taken by the Commission but instead only targets Chief Blackburn's statements to the Commission. Hicks argues the City somehow waived its right to challenge Chief Blackburn's statements to the Commission in its anti-SLAPP motion:

> Here, Fife's Assignment of Error makes clear that it filed the motion because the lawsuit was targeting protected participation and petition activity of the City's Civil Service Commission [...] To the extent Fife argues, inconsistent with its Assignment of Error and what it represented to the trial court, that it is actually moving on the public participation of Blackburn, the Court should also reject this argument.

Brief of Respondent, pp. 19-20. Hicks' argument is not supported by the City's position at either the trial court level or during this appeal.

Beginning with its Answer to Hicks' Complaint, the City made clear it viewed Chief Blackburn's oral statements to the Commission as protected activity under the anti-SLAPP statute, RCW 4.24.525: "The City is immune from liability...on plaintiff's retaliation claim against the City based on Chief Blackburn's oral statements to the Fife Civil Service Commission." CP 23. This language demonstrated the City viewed Chief Blackburn's oral statements to the Commission as protected activity in violation of the anti-SLAPP statute. When the City thereafter filed its anti-SLAPP motion, the City stated its intention to strike either avenue of

recovery alleged by Hicks with respect to the Civil Service Commission: "Plaintiff bases his retaliation claim on statements made by Chief of Police Brad Blackburn to the City of Fife Civil Service Commission (the "Commission") during an open public meeting, and a vote subsequently taken by the Commission." CP 75. Finally, to resolve any allegedly ambiguity about the nature of its anti-SLAPP motion, the City reiterated its position in the trial court reply brief supporting its Special Motion to Strike:

> As it originally articulated in its anti-SLAPP motion, the City challenges both the statements made by Chief Blackburn during the meeting of the Civil Service Commission and the subsequent vote taken by the Commission, both of which occurred during an open public meeting.

CP 557 (emphasis added). The City maintained this position on appeal: "Under the first step of the analysis, Chief Blackburn's statements during the open public meeting, and any subsequent acts taken by the Commission, constitute 'public participation and petition' activity protected by RCW 4.24.525(2)." Amended Brief of Appellant, p. 2. Throughout this entire dispute, the City has maintained a consistent position with respect to the specific retaliation claim and underlying activity targeted in its anti-SLAPP motion. Hicks' insistence the City waived the right to challenge Chief Blackburn's statements to the Commission lacks merit.

B. *Henne v. City of Yakima* is Not Controlling.

Hick argues a recent decision from Washington's Supreme Court, *Henne v. City of Yakima*, precludes the City (or any municipal entity) from the protections of RCW 4.24.525. *Henne v. City of Yakima*, 341 P.3d 284 (Jan. 22 2015). However, a plain reading of *Henne* demonstrates its holding is limited to the facts of the case and does not apply to this appeal.

In *Henne*, a Yakima police officer filed an employment discrimination lawsuit against the City of Yakima ("Yakima") after several other officers submitted complaints against him. *Id.* at 286. Yakima responded by filing a special motion to strike under RCW 4.24.525, arguing the coworkers' complaints and internal investigation constituted protected participation and petition activity. *Id.* However, the Supreme Court recognized the City never actually made a protected communication of its own, it simply received communications from others: "Yakima claimed the protection of the anti-SLAPP suit law because it received controversial communications from others; Yakima made no communications of its own." *Id.* Based on these facts, the Supreme Court addressed a narrow question: "...whether the party being sued—here, Yakima—engaged in any communicative activity that the statute protects." *Id.* at 288. The Supreme Court held a municipality must first engage in its own communicative activity before qualifying as a "moving party" under RCW 4.24.525: "We hold that a governmental entity like Yakima cannot take advantage of the anti-SLAPP statutes at

least where, as here, the challenged lawsuit is not based on the government's own communicative activity." *Id.* at 285.

Unlike the facts of *Henne*, here the City (of Fife) engaged in its own communicative activity when Chief Blackburn spoke at an open public meeting of the Civil Service Commission. The City, a legal entity, communicates through its authorized agents. *House v. City of Redmond*, 91 Wn.2d 36, 40 (1978). The City's Police Chief, Brad Blackburn, exercises authority over the Fife Police Department and is authorized to speak on its behalf. *See* CP 99-102. Pursuant to his job responsibilities, Chief Blackburn spoke on behalf of the City when he arrived at the Commission meeting and spoke in favor of allowing the lieutenant promotion list to expire. *Id.* As recognized by other courts in Washington, a municipality or county is "an artificial being, invisible, intangible, and existing only in contemplation of law," which by necessity "must act through its officers, directors, or other agents." *Broyles v. Thurston County*, 147 Wn. App. 409, 428 (2008). When a municipal officer or director speaks on behalf of a municipality, the communication becomes that of the municipality itself. *Id.* In *Henne*, in contrast, Yakima never made any communications of its own and never authorized any of its officers or directors, such as its police chief, to speak on its behalf. Instead, it merely conducted an internal investigation after receiving complaints from rank-and-file subordinates who were not authorized to speak on behalf of Yakima. *Henne*, 341 P.3d at 286. Unlike the facts of this appeal, the Supreme Court in *Henne* recognized that Yakima had

acted as a "silent governmental defendant" and therefore could never qualify as a "moving party" under RCW 4.24.525 because it had not engaged in any communication. *Id.* at 290. The City, in contrast, was not silent because it spoke through Chief Blackburn and therefore has standing.

Notably, despite Hicks' assertions to the contrary, in *Henne* the Supreme Court did not address whether a municipality is a "person" under RCW 4.24.525: "But we need not reach that broad question of whether Yakima can ever be a moving party under RCW 4.24.525...." *Id.* at 288. However, citing legislative history, the Supreme Court recognized the intention to protect both individuals and legal entities: "The legislature further explained, the costs associated with defending such [anti-SLAPP] suits *can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues*." *Id.* at 288 (emphasis in original) (*quoting* Laws of 2010, ch. 110 § 1(a)). In addition to the above-quoted legislative intent, the plain language of the anti-SLAPP statute states that it applies to any "individual, corporation...or any other legal or commercial entity." There is no dispute the City is a legally recognized municipal corporation. Although Hicks devotes a substantial portion of his brief to *Henne*, he admits this issue was not resolved by the Supreme Court: "The Washington Supreme Court recently adopted this same statutory interpretation without reaching the ultimate question of whether a governmental agency can ever file an anti-SLAPP motion." Brief of Respondent at 17 (emphasis added).

Henne simply does not apply to the facts of this appeal and does not prevent the City from filing an anti-SLAPP motion under RCW 4.24.525.

C. Hicks' Continued Reliance on California Law is Misplaced.

While recognizing California law is "not binding on Washington," Hicks argues California law prohibits a Washington court from striking the specific retaliation claim challenged by the City in its anti-SLAPP motion. Brief of Respondent, p. 26. California's recent, narrow interpretation of its anti-SLAPP statute is based largely on *Oasis West Realty, LLC v. Goldman*, 51 Cal 4th 811, 124 Cal. Rptr. 3d 256 (Cal. 2011), in which the California Supreme Court declared, in a single sentence, that "once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has established that its cause of action has some merit and the entire cause of action stands." *Id.* at 820. Based on *Oasis*, California courts have held California's anti-SLAPP statute does not permit the "excision of allegations" from an otherwise meritorious cause of action (*i.e.* a mixed cause of action). *See Baral v. Schnitt*, 233 Cal. App. 4th 1423, 1427 (Cal. 2015).

The California and Washington anti-SLAPP statutes are not identical in several important aspects. "Although the Washington statute was patterned after California's Anti-SLAPP Act, the statutes are not identical. Thus, when resorting to California decisions as persuasive authority, courts applying Washington's anti-SLAPP statute must pay special attention to provisions of the California statute that the Washington

State Legislature expressly adopted, modified, or ignored." *Jones v. City of Yakima Police Department*, 2012 WL 1899228, *3 (E.D. Wash. 2012). California's anti-SLAPP statute refers to "cause of action" without any broad definition of the phrase. Cal. C.C.P. Section 425.16. As a result, California courts applying the holding of *Oasis* have taken a narrow view of "cause of action." Washington's anti-SLAPP statute, in contrast, defines "claim" to include any "lawsuit, cause of action, claim ... however characterized." RCW 4.24.525. Such breadth is not found in the California version of the statute. The fact that Washington's legislature included separate terms, both "cause of action" and "claim," buttressed by the language "however characterized," suggests it intended a more liberal view than the California counterpart. Hicks ignores this distinction and continues to rely on California law by taking the narrow view that he asserts only a single "cause of action" under WLAD. Brief of Respondent, p. 16.

Hicks cites a recent decision from the California Court of Appeals. *Baral v. Schnitt*, 233 Cal. App. 4th 1423, 1427 (Cal. 2015). In *Baral*, the court applied the holding of *Oasis*, and by doing so, implicitly recognized the distinction between *Oasis* (prohibiting specific claims from being stricken in a mixed cause of action) and RCW 4.24.525 (broadly applying any claim or cause of action, "however characterized"). The court in *Baral* recognized the "growing debate" over this issue and pointed to the narrow intent of the California legislative:

> ...the anti-SLAPP statute states that it applies to a 'cause of action.' The Legislature amended the statute several times, but left intact its application to a 'cause of action.' If the better rule is to apply the statute to less than a cause of action, enacting that rule is a legislative function, not a judicial one.

Id. at 1427, 1442. While the California legislature amended the statute several times, it never adopted a broad definition of "cause of action." RCW 4.24.525 has been different since its inception. The fact that RCW 4.24.525 expressly defines "claim," "cause of action," and "lawsuit" separately, and then also reiterates that the statute applies to any formulation of allegations, "however characterized," demonstrates the legislature's intention to apply the anti-SLAPP statute to specific claims, not just entire legal theories or entire complaints. Based on this distinction, Hicks' endorsement of California law is not controlling.

D. Hicks Continues to Prosecute a Specific Claim of Retaliation Against the City Based on Protected Activity.

As discussed above, RCW 4.24.525 applies to any "claim...however characterized." On appeal, Hicks argues the specific retaliation claim challenged by the City in its anti-SLAPP motion is not actually a "claim" under RCW 4.24.525, but instead "merely evidence" supporting a single consolidated WLAD lawsuit. Brief of Respondent, p. 11. Likewise, at the trial court level, Hicks attempted to distance himself from the challenged retaliation claim by arguing his lawsuit focused not on expiration of the lieutenant promotion list, but instead on the other adverse employment action taken against him: "...the Amended

Complaint clarifies that the adverse employment actions are the focus of Hicks' claim." CP 26.

This is not a situation where Hicks simply made passing reference to Chief Blackburn's statements to the Civil Service Commission (and the vote subsequently taken by the Commission) as "mere evidence" in a single sentence or footnote of his Complaint. Hicks included the claim in a standalone paragraph (¶ 4.3) of his Complaint. CP 2-3. The specific allegations and timeline of this claim stand apart from his other retaliation claims (based on different acts and on a different timeline), and provide Hicks an independent avenue to establish liability against the City. Hicks' approach to stating this claim independently satisfied the pleading conventions of the civil rules. *See* CR 10(b) ("each claim founded upon a separate transaction or occurrence...shall be stated in a separate count..."). Moreover, the discovery served on the City by Hicks demonstrates his intent to prosecute the specific claim against the City:

> Request for Production No. 17: Produce all documents regarding the decision not to extend Fife's Certified Eligibility Register for Police Lieutenant in 2012.
>
> Interrogatory No. 11: Identify each time the City of Fife has allowed its Certified Eligibility Register to expire while there was a vacant position and eligible candidates on the Register.
>
> Request for Production No. 22: Produce all documents regarding any decisions to let Fife's Certified Eligibility Register for positions in the police department to expire.

> Request for Production No. 23: Produce all documents regarding any decisions to extend Fife's Certified Eligibility Register for Police Lieutenant.
>
> Interrogatory No. 12: State how much money it costs to produce a Certified Eligibility Register for Police Lieutenant.
>
> Request for Production No. 24: Produce all documents regarding Fife's Certified Eligibility Register for Police Lieutenant, including but not limited to, costs for creating and maintain the Register.

See, e.g., CP 555. While Hicks attempted to amend his complaint to remove the challenged claim and avoid the anti-SLAPP penalty, he makes clear that he still intends to establish liability against the City based on Chief Blackburn's protected statements during the open public meeting of the Commission: "Hicks was clear that he intended to utilize this same evidence..." Brief of Respondent, pp. 11-12. Hicks should not be permitted to pursue a retaliation claim against the City targeting protected public participation and petition activity and then use that protected activity as a basis for establishing WLAD liability. RCW 4.24.525(4)(b).

E. The City Has Established the Two-Part Analysis Mandated by RCW 4.24.525.

A party filing a special motion to strike under RCW 4.24.525 must satisfy a two-step analysis. First, the moving party must demonstrate, by a mere preponderance of the evidence, that the challenged claim is based on an action involving public participation and petition. Second, the non-moving party must establish, by a heightened clear and convincing

standard, a probability of prevailing on the challenged claim. The City has satisfied the first step and Hicks cannot satisfy the second.

1. The Challenged Retaliation Claim is Based on an Action Involving Public Participation and Petition.

Under the first step of the anti-SLAPP analysis, the City has the burden to establish, by a preponderance of the evidence, that the challenged retaliation claim "is based on an action involving public participation and petition." RCW 4.24.525(4)(b). The City has satisfied this burden. As discussed in a previous section of this brief, the City has standing to file a special motion to strike. RCW 4.24.525 applies to any "corporation" or "legal entity." RCW 4.24.525. The City is both a municipal corporation and a recognized legal entity. Despite Hicks' assertions to the contrary, no court in Washington has held that a municipality is prohibited from filing a motion under RCW 4.24.525 when it has engaged in statutorily protected activity. To hold otherwise would contradict the plain language of the statute. Here, the City engaged in protected activity. The statute applies to "an action involving public participation and petition," including oral statements made in public forums and oral statements "made...in connection with an issue under consideration or review by a legislative, executive, or juridical proceeding or other governmental proceeding authorized by law." RCW 4.24.525(2). Chief Blackburn's statements during the open public meeting of the Commission satisfy this standard. Other Washington courts are in agreement that statements submitted before a civil service commission are

protected by the anti-SLAPP statute. *Castello v. City of Seattle*, 2010 WL 4857022 (W.D. Wash. 2010).

2. Hicks Cannot Demonstrate, by Clear and Convincing Evidence, a Probability of Prevailing on the Challenged Retaliation Claim.

Under the second step of the anti-SLAPP analysis, the burden shifts to Hicks to establish, by a heightened standard of clear and convincing evidence, a probability of prevailing on the claim. RCW 4.24.525(4)(b). Hicks remains adamant he is not attempting to establish liability against the City for the acts of the Civil Service Commission, but instead for Chief Blackburn's oral statements to the Commission. Even accepting this as true, Hicks still cannot satisfy the second step of the anti-SLAPP analysis.

Hicks cannot establish WLAD liability against the City based on Chief Blackburn's statements to the Commission because he cannot show unlawful pretext with clear and convincing evidence. Under the burden shifting analysis required of a WLAD discrimination claim, an employer may rebut a *prima facie* claim of retaliation by establishing a legitimate, nondiscriminatory reason for its actions. *Renz v. Spokane Eye Clinic*, 144 Wn. App. 611, 618 (2002). The burden then shifts back to the employee to establish that the employer's stated reason is pretext for discrimination. *Id.* at 618-19. Here, Hicks attempts to circumvent this burden-shifting framework by asserting the City did not have a lawful reason for expiration of the lieutenant promotion list:

> Fife has never articulated any reason for why it passed over Hicks, who was ranked first on the Civil Service list, and then declined to hire Hicks for the second Lieutenant position.

Brief of Respondent, p. 38. This assertion is false. At both the trial court level and on appeal, the City clearly laid out specific arguments supporting expiration of the lieutenant promotion list. *See* Amended Brief of Appellant, pp. 42-44. The City demonstrated two lawful and legitimate reasons supporting expiration of the lieutenant promotion list and adoption of a new list. CP 99-100. First, several new qualified candidates were excluded from the expiring eligibility list, and the adoption of a new, fresh list would afford these candidates an opportunity to test for promotion. *Id.* Adopting a new list would therefore promote internal fairness among employees and expand the pool of qualified candidates. *Id.* Second, the expiring promotion list was based on an outdated assessment system, and adoption of a new, fresh list would be based on the Skillworks assessment system, provided by an outside third party, and uniquely tailored to the needs of the City by better targeting issues related to supervision and leadership. *Id.* These factors were not just supported by Chief Blackburn, but also by City Manager Dave Zabell, individual members of the Civil Service Commission, and a representative from Skillworks. *Id.* When the City argued for adoption of the new list, it did so with lawful and non-discriminatory reasons.

Hicks ignores the rationale supplied by the City and instead continues to insist that "Fife has never articulated any reason for why it passed over Hicks." Brief of Respondent, p. 38. On appeal and at the trial

court level, Hicks has spent absolutely no time—none—arguing why the factors provided by the City in support of a new list are allegedly discriminatory or illegitimate. Moreover, Hicks was not promoted to lieutenant after the Skillworks assessment system was adopted because he declined to test under the new system, not because the City allegedly discriminated against him. Hick has not satisfied the burden-shifting framework. Moreover, under federal law, courts have ruled the expiration of a stale promotion list is both legitimate and nondiscriminatory and therefore not evidence of unlawful discrimination. *Hozzian v. City of Chicago*, 585 F.Supp.2d 1034 (N.D. Ill. 2008); *U.S. v. City of Chicago*, 796 F.2d 205 (7th Cir. 1986). Hicks has failed to address or rebut the arguments addressed by these federal courts.

Hicks has the affirmative burden to come forward with evidence demonstrating, with clear and convincing evidence, that the decision to allow the lieutenant promotion list to expire was pretext for unlawful discrimination. Hicks has not met this burden.

F. Hicks' Constitutional Challenges to RCW 4.24.525 Should Be Dismissed On Jurisdictional Grounds.

In this appeal, Hicks not only argues for affirmation of the trial court ruling on the City's Special Motion to Strike, but also argues RCW 4.24.525 should be declared unconstitutional. Brief of Respondent, p. 41-47. In particular, Hicks argues the statute violates the right to freedom from discrimination, the separation of powers doctrine, the right to a trial by jury, the right of access to the courts, and the First Amendment. *Id.*

No court in Washington has declared RCW 4.24.525 unconstitutional. Washington's Supreme Court recently reviewed the statute in *Henne* and did not question the legality of the statue or the legislature's right to enact it. *Henne*, 341 P.3d 284. Regardless, Hicks' constitutional challenges should be dismissed on jurisdictional grounds.

Under RCW 7.24.110, the Attorney General must be served and afforded an opportunity to be heard "in any proceeding" challenging the constitutionality a "statute, ordinance, or franchise." *Id.* In *Camp Finance LLC v. Brazington*, the Court of Appeals dismissed the plaintiff's constitutional challenge to a statute on jurisdiction grounds because the Attorney General had not been served with notice of the challenge:

> The question presented is whether the attorney general must be served when a party challenges the constitutionality of a statute...A plaintiff who seeks to have a statute declared unconstitutional must provide the attorney general with notice of the action. The attorney general is entitled to be heard. This is because the state as a whole is interested in the validity of our state statutes, and it is evident that the legislature desires to protect that interested when it provided for service of the proceedings upon the attorney general.

Camp Finance, LLC v. Brazington, 133 Wn. App. 156, 161 (2006) (internal citations and quotations omitted). Here, Hicks never served the Attorney General, not at the trial court level or on appeal. The constitutional challenges raised in this appeal should not be considered.

RCW 7.24.110 is a subsection of Washington's Uniform Declaratory Judgments Act, RCW 4.24 *et seq*. However, courts in Washington have applied the jurisdictional bar imposed by RCW 7.24.110

in other circumstances. For example, in *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), the plaintiff filed a civil rights lawsuit against the City of Seattle, not a declaratory judgment action. However, during the course of litigation, the trial court declared a Washington statute unconstitutional. *Id.* at 439. The Ninth Circuit overruled the trial court on jurisdictional grounds because of a lack of notice to the Attorney General: "...the district court abused its discretion in failing to provide the State of Washington (or the City of Seattle) an adequate opportunity to be heard when it contemplated granting an unrequested declaratory judgment ruling on the constitutionality of RCW 9.73.030." *Id.* at 442.

Likewise, in *Pepper v J.J. Welcome Construction*, the plaintiff in a tort action argued the trial court erred when it refused to declare a state statute unconstitutional. *Pepper v. J.J. Welcome Construction*, 73 Wn. App. 523, 549 (1994), *overruled on other grounds by Phillips v. King County*, 87 Wn. App. 468 (1998). The Court of Appeals declined to review the constitutional challenge: "When a statute is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard...However, because a copy of the challenge was not served upon the Attorney General as required by RCW 7.24.110, the jurisdiction of the court was not invoked to obtain the requested declaratory relief." *Id.*

The City raised the issue of non-compliance with RCW 7.24.110 at the trial court level when Hicks made the same constitutional challenge. The City raised the issue again during this appeal, when Hicks attempted

to dismiss the appeal. *See* Appellant City of Fife's Opposition to Respondent's Motion to Dismiss Appeal. Hicks, for a third time, challenges the constitutionality of RCW 4.24.525 with the Court of Appeals, again without complying with the statutory notice requirement. If Hicks believes the statute somehow does not apply to him or this lawsuit, he has not explained the rationale behind such a position. As a result of this noncompliance, Hicks' constitutional challenges to RCW 4.24.525 should not be heard on jurisdictional grounds.

III. CONCLUSION

Based on the foregoing authority, the City requests the Court reverse the trial court's order denying its motion to strike, strike the specific retaliation claim challenged by the City involving the Civil Service Commission (paragraph 4.3 of Hick's complaint), and award the statutory $10,000 penalty and award of attorneys' fees and costs.

DATED this 6th day of April, 2015.

Respectfully submitted,

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DATED this 6th day of April, 2015.

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